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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, *Petitioner*

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Laws Involved	4
Statement	4
Reasons for Granting the Writ	7
Conclusion	18

	Appendix Page
APPENDIX A	
U. S. Constitutional Provisions	1
N. C. Constitutional Provisions	2
Statutes	4
APPENDIX B	
Opinion in *Cannon* v. *City*	18

TABLE OF CASES CITED

Cannon v. *City of Wilmington*, et al., 242 N. C. 711, 89 S. E. 2d 595 (1955) 2, 6, 7, 8, 11, 13, 17

Eason v. *Spence*, 232 N. C. 579, 61 S. E. 2d 717 10

Eller v. *Board of Education*, 242 N. C. 584, 89 S. E. 2d 144 (1955) 10, 11

Ivester v. *City of Winston-Salem*, 215 N. C. 1, 1 S. E. 2d 88 ..... 8, 10

McKinney v. *City of High Point*, 237 N. C. 66, 74 S. E. 2d 440 (1953) 8, 11

McKinney v. *City of High Point*, 239 N. C. 232, 79 S. E. 2d 730 (1954) 8

Moore v. *Clark*, 235 N. C. 364, 70 S. E. 2d 182 (1952) 8

Proctor v. *State Highway, etc., Comm.*, 230 N. C. 687, 55 S. E. 2d 479 (1949) 8, 10

Rhodes v. *City of Durham*, 165 N. C. 679, 81 S. E. 938 8

Sale v. *State Highway and Public Works Commission*, 242 N. C. 612, 89 S. E. 2d 290 (1955) 10, 11

Sanders v. *Atlantic Coast Line R. Co.*, 216 N. C. 312, 4 S. E. 2d 902 10

TABLE OF LAWS CITED

CONSTITUTIONAL PROVISIONS

	Page
Preamble to U. S. Constitution	14
First Amendment to U. S. Constitution	4
Fifth Amendment to U. S. Constitution	3, 4, 6, 8, 15
Fourteenth Amendment to U. S. Constitution, § 1	3, 4, 6, 14, 15

NORTH CAROLINA CONSTITUTION

Article I	
§ 1	3, 4
§ 2	4
§ 9	3, 4
§ 17	3, 4, 6, 8, 10, 17
§ 18	4, 14
§ 19	3, 4, 14
§ 29	4, 17, 18
§ 35	3, 4, 14
§ 37	4, 16
Article IV, § 9	1, 4, 6

STATUTES

28 U. S. C., § 1257(3)	2
General Statutes of North Carolina:	
§ 1-228	4, 12
§ 7-8	1, 4, 6
§ 7-9	1, 4, 6
§ 40-12 (Chapt. 40, "*Eminent Domain*")	8, 10, 11, 17
§ 47-27	4, 12
§ 136-5	4, 6
§ 136-6	4, 6
§ 136-18	4, 6
§ 136-19	4, 6, 10, 17

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---

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered in the above cause on 21 March 1956, denying, without hearing, or even pleading by the Respondent, the Petitioner's application for writ of mandamus from the Supreme Court of North Carolina. This action was filed originally in the North Carolina Supreme Court under the provisions of § 9 of Article IV of the Constitution of the State of North Carolina and § 8 and § 9 of Chapter 7 of the General Statutes of the State of North Carolina.

[Note: The North Carolina State Highway and Public Works Commission is herein referred to as the Respondent, whether it be in discussions of the instant action or in discussions of the prior action. The other defendant in the prior action is herein referred to as The City.]

OPINIONS BELOW

The only opinion in the instant case is that of the North Carolina Supreme Court. However, in the opinion in another prior case, entitled "W. A. CANNON v. CITY OF WILMINGTON, NORTH CAROLINA; and NORTH CAROLINA STATE HIGHWAY and PUBLIC WORKS COMMISSION." (242 N.C. 711, 89 S.E. 2d 595 (1955); Appendix B; herein referred to as *Cannon* v. *City*), referred to in the Petitioner's complaint, the North Carolina Supreme Court, on the grounds that it did not state a cause of action over which the court had jurisdiction, sustained Respondent's demurrer to this Petitioner's complaint in *that* action.

JURISDICTION

The judgment of the Supreme Court of North Carolina was dated and entered 21 March 1956. By order of this Court entered 18 June 1956 by Associate Justice Hugo L. Black, the Petitioner's time for filing petition for writ of certiorari was extended to and including 6 August 1956.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., § 1257(3).

The federal questions herein presented were raised in North Carolina Supreme Court by the complaint (especially Paragraphs 5 through 15, both inclusive). Without any pleadings being filed by Respondent the Supreme Court of North Carolina denied Petitioner's application, or complaint, for a writ of mandamus and did not specifically pass upon the federal questions presented. The opinion of the North Carolina Supreme Court in *Cannon* v. *City*, dismissing this Petitioner's complaint to quiet title as to the Respondent, indicated that: "Certainly, if defendant Commission claims a right of way over plaintiff's land, plaintiff is entitled as a matter of right to require that defendant define with par-

ticularity the location and extent of its claim; and, if it refuses or fails to do so, plaintiff can invoke the remedy of mandamus." The North Carolina Supreme Court did not render a decision as to whether the acts of the Respondent, in appropriating private property to public use merely by claiming easements for highway right-of-ways over private property without following either of the statutory procedures (deed or condemnation), violate either the statutory or constitutional (state or federal, or both) provisions, or both, where the Respondent either actually takes possession and use of the lands or merely claims that its easement or ownership extends over the lands. This Petitioner has alleged that any such claims of the Respondent to any possession or interest whatsoever in, on, or over, such properties are invalid as violations of both constitutions, as well as the statutes, in that such claims amount to taking private property for public use without either due process of law or just compensation.

Thus, Petitioner has exhausted his remedies in the Courts below.

The judgment of the North Carolina Supreme Court is final by its terms, in that it denies the relief sought.

QUESTIONS PRESENTED

1. Whether the acts of the State of North Carolina, acting through its agency, the North Carolina State Highway and Public Works Commission, in claiming ownership or possession, or both, of some of Petitioner's lands for a perpetual easement for right of way for highway purposes without acquiring any title thereto, violate the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States as well as the provisions of §§ 1, 9, 17, 19, and 35 of Article I of the Constitution of the State of North Carolina.

2. Whether the State, acting through one of its agencies, can validly appropriate private property for public use by merely claiming ownership or taking possession thereof, or both.

3. Whether the acts of North Carolina State Highway and Public Works Commission, acting for the State of North Carolina, in entering upon and taking possession of private property and never acquiring title by either "purchase, donation, or condemnation" constitute violations of its prescribed duties.

LAWS INVOLVED

The statutory provisions involved are North Carolina General Statutes, § 1-228; § 7-8; § 7-9; § 47-27; § 136-5; § 136-6; § 136-18, and § 136-19.

The constitutional provisions involved are:

Constitution of North Carolina, Article I, §§ 1, 2, 9, 17, 18, 19, 29, 35, 37, and Art. IV, § 9; and

Constitution of the United States First, Fifth and § 1 of Fourteenth Amendments.

All of the above mentioned laws are set forth in Appendix A hereto.

STATEMENT

Prior to 1939 a right of way for a street and highway, then known as the Carolina Beach Road, or Wilmington Beach Boulevard, or Carolina Beach Boulevard, or North Carolina Highway Number 40, existed as dedicated by maps of "Sunset Park" Subdivision, as developed by the Fidelity Trust and Development Company. The maps by which that right-of-way was dedicated by the Fidelity Trust and Development Company did not and do not indicate the width thereof as it then passed and now passes the Petitioner's property. In 1939 and several times since then the Respondent has improved the said road by paving and widening the pavement without

any regard whatsoever as to the location of the right-of-way as set up and dedicated by the said developer. In each instance the Respondent indicated that it was going to claim and acquire additional width for the easement of the right-of-way of said highway. However, in no instance has Respondent obtained any instrument conveying to it any of Petitioner's lands. Nor has Respondent ever instituted in any court of this State any proceedings for the condemnation of any of the Petitioner's property. Further, Respondent has never furnished the Petitioner with any description of such of his property as Respondent desired or claimed for said easement and has never paid or offered to pay to Petitioner any compensation whatsoever for such of Petitioner's lands as Respondent desired or desires for highway purposes. W. A. Cannon is and has been the record title owner of and in use and possession of said lands for 22 years or more. There is no record title in the Respondent nor any proceeding by Respondent divesting Cannon of any of his lands, despite the fact that Respondent claims to have acquired such right-of-way in 1939. In 1946 the city limits of the City of Wilmington were extended from a point several blocks northwardly of Petitioner's property to a point several blocks southwardly of Petitioner's property.

On 28 February 1955 in the Superior Court in and for New Hanover County, North Carolina, Petitioner filed complaint against Respondent and the City, asking that the cloud of their claims be removed from his title and for damages thereto resulting from such injury to his title and impairment of the use and enjoyment of his property. Both defendants therein separately demurred to the jurisdiction of that Court over them and over the subject-matter of the action, which demurrers were sustained by the Superior Court. On appeal the Supreme Court of North Carolina affirmed the judg-

ment as to the Respondent, thereby sustaining its demurrer and dismissing that action as to the Respondent; but reversed the judgment as to the City, thereby overruling its demurrer and remanding that case to the Superior Court of New Hanover County, North Carolina, for further proceedings and trial as to the City. That opinion of the North Carolina Supreme Court, reported in 242 N.C. 711, 89 S.E. 2d 595, filed 12 October 1955 (Appendix B), indicated to Petitioner the present action for mandamus, which was filed in the Supreme Court of the State of North Carolina on 20 March 1956, as an action under the provisions of § 9 of Article IV of the Constitution of the State of North Carolina and §§ 7-8 and 7-9 of the General Statutes of North Carolina (Appendix A, pages 3-5). On 21 March 1956, without any pleadings being filed by Respondent or any hearing, the Supreme Court of North Carolina denied Petitioner's application for writ of mandamus.

Petitioner's complaint, or application, for writ of mandamus is based upon the allegations that acts of the Respondent, in claiming against Petitioner's property title to and right of possession of a perpetual easement for the right of way for its said highway, which it has not acquired by "either purchase, donation, or condemnation," violate the oaths of office of the members of Respondent in that the said acts offend the provisions of Fifth and Fourteenth Amendments to the Constitution of the United States of America and § 17 of Article I of the Constitution of the State of North Carolina, as well as the provisions of Chapter 136 of the General Statutes of North Carolina. Such acts amount to a taking of private property for public use without just compensation and to depriving Petitioner of his property without due process of law. Chapter 136 of the General Statutes of North Carolina does not provide any such method for Respondent to acquire either title to or right to posses-

sion of right-of-ways or lands for highway purposes, but limits Respondent's methods therefor to "either purchase, donation, or condemnation." Such acts leave the status of Petitioner's title to said lands and Petitioner's right to possession of his lands in doubt, because Repondent has done and will do nothing to acquire record title to such of Petitioner's property as Respondent needs or desires, thereby depriving Petitioner of the full use and enjoyment of his property, of the fruits of his own labor, and of his property, without due process of law.

REASONS FOR GRANTING WRIT

1. The decisions of North Carolina Supreme Court in the instant case and in the prior case of *Cannon* v. *City* are directly in conflict with the provisions of the Constitution of the United States, the Constitution of the State of North Carolina, and the statutory laws of the State of North Carolina.

Cannon v. *City* was brought primarily for clarifying the title to the Petitioner's real property. It was precipitated by the attempts of the Petitioner to lease the property for the construction of a service station thereon, which resulted in the attorney who searched title being forced to report to the lessee that he could not certify clear title in Cannon as to the full limits and extents of Petitioner's boundaries but would have to limit such certification to that portion of Cannon's lands which would most certainly be beyond any claims of Respondent. Such title attorney gave as his reason that he could find no record to indicate the extent of Respondent's claims against Petitioner's real property and could not tell where the true center-line of its right of way was located. When the North Carolina Supreme Court dismissed the action as to the Respondent, Petitioner had no adequate remedy at law, or equity, whereby to clarify his title except that of writ of mandamus, as indicated by

North Carolina Supreme Court in its opinion in *Cannon* v. *City* (242 N.C. 711 at page 714, 89 S.E. 2d 595 at page 597, Appendix B, page 20). Since Respondent has refused to "define with particularity the location and extent of its claim" and does not discuss with Petitioner the purchase of such of Petitioner's land as it desires, the special proceeding provided in North Carolina General Statutes § 40-12 is not open to Petitioner. *Proctor* v. *State Highway, etc., Comm.*, 230 N.C. 687, 55 S.E. 2d 479 (1949); *Moore* v. *Clark*, 235 N.C. 364, 70 S.E. 2d 182 (1952). Further, the North Carolina Supreme Court, in *Cannon* v. *City*, (Appendix B, page 20), held that Respondent has not "taken" any of Petitioner's property, a holding which we do not understand. In *McKinney* v. *City of High Point*, 237 N.C. 66, 74 S.E. 2d 440 at page 447 (1953), the Supreme Court of North Carolina held it was a taking of property for which the owner was entitled to just compensation where the erection of a water tank by a municipality "cheapened" McKinney's lands, which were located across the street from the water tank. In that case, again on page 447 of 74 S.E. 2d, the North Carolina Supreme Court said: "'"Public necessity may justify the taking, but cannot justify the taking without compensation,"'" citing many cases, and, "To hold otherwise would be in violation of the State and United States Constitutions. 'No person ought to be * * * disseized of his freehold, liberties or privileges * * * or in any manner deprived of his life, liberty, or property, but by the law of the land.' North Carolina Constitution, Art. 1, § 17, 'Nor shall private property be taken for public use, without just compensation.' U.S. Constitution, Amend. 5; *Rhodes* v. *City of Durham*, 165 N.C. 679, 81 S.E. 938; *Ivester* v. *City of Winston-Salem*, 215 N.C. 1, 1 S.E. 2d 88." The same case was again before the North Carolina Supreme Court, 239 N.C. 232, 79 S.E. 2d 730 (1954), and these holdings not disturbed.

Petitioner therefore contends that the acts of Respondent in creating a cloud upon his title to the said real property are a taking of private property for public use without either just compensation or due process of law, "in violation of the State and United States Constitutions," in that its value is "cheapened" thereby Petitioner further contends that the failure of Respondent to "define with particularity the location and extent of its claim" and to acquire a record title thereto is a taking of private property for public use without just compensation and without due process of law, in violation of the said Constitutions, in that it impairs Petitioner's full use and enjoyment of his said lands. If such description by Respondent of its claims against Petitioner's real property shows that Respondent is actually in possession of some of Petitioner's lands, we feel that there could be no doubt that there would be such a taking.

The procedure which Respondent follows as a general rule in regard to "acquisitions" of lands desired by it for highway purposes is to lay out the highway or the widening of the highway, to proceed to construct the highway or the widening of a highway, and to post notices at each end of the project and the proper court house doors. Then when six or twelve months expire without any claims being filed, Respondent considers that it has "acquired" title to lands or the easements included in the project. For several years (ten to twenty) this has been Respondent's general practice, rather than the exception. In relatively rare instances does Respondent secure deeds to the lands or easements, or use condemnation proceedings to acquire title to them. The result is great confusion in the State of North Carolina as titles to real properties abutting highways. This confusion is confounded by the fact that owners frequently find that the center lines thereof claimed by Respondent

do not correspond at all with the original center lines before such widenings. This procedure is not prescribed by law, either statutory or constitutional, as one of the methods by which Respondent may acquire such lands, or easements, or rights of way. General Statutes of North Carolina, § 136-19 (Appendix A, page 14), prescribes only *three* methods: purchase, donation, or condemnation by "the ways, means, methods, and procedure" of chapter 40, entitled "Eminent Domain."

In *Sale* v. *State Highway and Public Works Commission*, 242 N.C. 612, 89 S.E. 2d 290, opinion filed 28 September 1955, the North Carolina Supreme Court said:

> "This Court said in *Eason* v. *Spence*, 232 N. C. 579, 61 S.E. 2d 717, 721: 'Under Article 1, § 17, of the State Constitution, no person can be deprived of his property except by his own consent or the law of the land. The law of the land and due process are interchangeable terms.'
>
> "This Court said in *Eller* v. *Board of Education*, (242) N.C., (584), 89 S.E. 2d 144, 146: 'When private property is taken for public use, just compensation *must* be paid. (Emphasis added) * * * While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as integral part of the "law of the land" within the meaning of Art. I, § 17.'
>
> "This principle is so grounded in natural law and justice that it is part of the fundamental law of the State. *Ivester* v. *City of Winston-Salem*, 215 N. C. 1, 1 S.E. 2d 88, and imposes upon a governmental agency taking or appropriating private property for public use a correlative duty to make just compensation to the owner of the property appropriated. *Proctor* v. *State Highway Comm.* 230 N.C. 687, 55 S.E. 479; *Sanders* v. *Atlantic Coast Line R. Co.*, 216 N.C. 312, 4 S.E. 2d 902.
>
> "* * * * *

"A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation. (Citing many cases)

"* * * * *

"In this State when a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient. (Citing cases)

"The courts of the land to preserve the liberty and rights and property of the people, must adhere to the plain stipulations of the fundamental law, and it will be a tragic day in the history of our democratic constitutional form of government, if the courts should ignore the clear mandates of the organic law."

It is to enforce this "correlative duty," which is also recognized in the statute granting powers the Respondent, that this action for writ of mandamus was brought and this Petitioner asks this Court for writ of certiorari to review the adverse decision of the court below. Also, the decisions in the two *Cannon* Cases would seem to be in irreconcible conflict with the principles set forth in the *Sale* Case, supra, and the *Eller* Case, supra, in that the *Cannon* decisions deny this Petitioner's remedy against the Respondent. It is true the first *Cannon* Case says that Petitioner's remedy for just compensation is "by special proceeding as provided in G.S. § 40-12, but that opinion also held that there had been no "taking" of Petitioner's property or any interest therein. So far we have been unable to determine what the court below considers a "taking." Therefore, that phase of the decision would seem to be in irreconcible conflict with the decisions of that court in such cases as *McKinney* v. *City of High Point*, supra page 8.

2. Thus, the instant case of great importance to determine whether these acts of Respondent conform its duties to the people of the State of North Carolina, as the same are defined in the State and Federal Constitutions and in the North Carolina Statutes. If the Respondent can use that procedure the burden will be placed upon the property owners to determine the description of the property desired by Respondent and to institute proceedings against Respondent to recover the "just compensation" prescribed by the Constitutions, even though it may be years later before the property owner discovers the extent of Respondent's desires. If Respondent's acts are proper, private property knows no safety from invasion at the will of the Respondent, and the owners can never be apprised of the quality and quantity of their ownership. If Respondent's method is valid, we in North Carolina are faced with a police state in which there is no defense against invasion and taking of our properties and no protection from being "disseized of his freehold, liberties or privileges." For these reasons Petitioner contends that this Court must open its doors by writ of certiorari in this case, for too long have the doors of the North Carolina courts been slammed in our faces.

In North Carolina we thought it was settled beyond peradventure that any claim of any interest in or to real property had to be in writing and properly recorded according to the prescribed statutory methods, except in cases of title by adverse possession, which do not here apply. (G. S. §§ 1-228; 47-27(3); Appendix A, pages 3 and 5). Now, Respondent comes along to claim that it can acquire title to lands desired by it for its purposes without any muniments, that all it needs do to acquire title to the desired real property or interest in real property is run its road by or over the lands and post notices at the court doors and at the ends of the project (whether it be 100 feet or 100 miles long). If that be correct or good law, how can we ever be expected to tell from

title search what lands are owned by whom? Since many descriptions are tied in with roads or highways as monuments for a beginning point or one or more calls, of which the right of way may have been altered or widened, what confounding of the confusion will not result? Such confusion confounded can be avoided by requiring the Respondent to perform its duties of acquiring such rights of way and title to such land as it needs by "either purchase, donation, or condemnation"—by either deed or court proceeding — whereby record is made of its claims in the county where the land lies.

Settlement of this question of whether Respondent's acts are valid is plainly in the public interest for the stabilization of titles to real property, if for no other reason. But, there is other reason. It is in the public interest to know how far a state or state agency — or any other governmental agency — can invade private property for supposedly public purpose without either just compensation or due process of law. It is in the general public interest to construct and maintain highways. It is *NOT* in the public interest to have the state's title to the lands or easements for those highways to be questionable. It is *NOT* in the public interest to allow Respondent's said acts to convert title to lands abutting highways from fee simple absolute to tenancies at the will of Respondent.

3. The decisions of the Court below are clearly erroneous. In *Cannon* v. *City* the North Carolina Supreme Court held as to the Respondent that no cause of action over which courts had jurisdiction was stated because that complaint alleged that Respondent's claims were and are invalid; but as to its co-defendant the City of Wilmington, North Carolina, on the same allegations, a good cause of action had been stated over which the court had jurisdiction, as well as jurisdiction over the parties. This seems to be conflicting. If no cause of action were stated

against Respondent because it was alleged that its claims were invalid and could not constitute a cloud on Petitioner's title, certainly the same rule would apply as to the City. However, what is a cloud but an invalid claim, since if it were valid it would constitute good title? That case tends to set up one rule of law as to the complaint therein against Respondent and another as to the complaint therein against the City, although they are co-defendants in the same action to remove the cloud of their claims against Petitioner's property.

However, in that case the North Carolina Supreme Court indicated that Petitioner should use the remedy of mandamus against Respondent, which Petitioner has done in the instant case. Now, the North Carolina Supreme Court denies Petitioner the remedy which it indicated to petitioner. It is not clear whether the North Carolina Supreme Court's order dated 21 March 1956 denies the writ of mandamus or denies the order for service of the complaint on the Respondent. In either instance it denies the relief sought. Therefore, if the doors of any court are to be open to Petitioner for relief against the illegal acts of Respondent it must be by certiorari to this Court. In order to "secure the blessings of liberty to ourselves and our posterity" (Preamble to the Constitution of the United States), in order to have "equal protection of the laws" (§ 1, Amend. XIV, Constitution of U. S.), in order that "every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed." (Art I, § 18, N. C. Constitution, Appendix A, pages 2 and 3), in order that "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable." (Art. I, § 19, N. C. Constitution, Appendix A,

page 3), and in order that "all court shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and right and justice administered without sale, denial, or delay." (Art. I, § 35, N.C. Constitution, Appendix A, page 3), we here apply to this Court as our last resort for relief. In the past we have fought off every known invasion and interference with the full use of Petitioner's lands. Now, if Petitioner is even to "know with certainty the exact limits of the appropriation made by" Respondent so that Petitioner may know of what part of his lands he has free and unfettered use, as well as that such may be made of record in the county wherein the land lies for future title searches, we need the relief of a favorable decision from this Court.

The decision of the court below is erroneous because it sanctions the hiding of the Respondent's abuse of its powers behind the cloak of governmental immunity. It was not intended that the governments of this Country could, except in times of emergency, take private property without either the written consent of its owner or court procedures—due process of law. The power of eminent domain is not inherent in our governments, but is a grant of power made in the organic law with the conditions precedent attached that it must be exercised by due process of law and payment of just compensation. The language of the Fifth Amendment to the Constitution of the United States exemplifies this: "No person *shall* * * * be deprived of life, liberty, or property, without due process of law; nor *shall* private property be taken for public use without just compensation." The language of the Fourteenth Amendment thereto is similar in its application to the states. Except by inference from the language of § 17 of Article I, of the North Carolina Constitution, (Appendix A, page 2), there is some serious doubt in my mind whether the government of the State of North Carolina has *ever* been granted the

power of eminent domain. Certainly, there is no specific delegation of that power in the North Carolina Constitution. In § 37 of Article I thereof the language is: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." (Appendix A, page 3). However, we will not here belabour that point. The main point is that, without the benefit of *any* process of law, Respondent contends that it has "acquired" a right of way over Petitioner's lands for its highway, while Petitioner contends that, in so doing, Respondent has acted beyond its powers and has been derelict in it duties by not acquiring it in one of the only *three* manners prescribed by law. The North Carolina Supreme Court, in denying Petitioner's application for mandamus, apparently sanctions Respondent's methods, which Petitioner claims violate both the Federal and State Constitutions, as a taking of private property without due process of law and without just compensation.

Respondent admits that it has never paid any compensation for such of Petitioner's lands as it may have "taken" and has never obtained any muniment thereto. Respondent m e r e l y says, in effect: "I've gone through here and claim to have acquired a right of way 100 feet wide wherever I want it, regardless of where the original right of way was dedicated by the developer of Sunset Park. I'm not going to pay you anything for any property I need; but, without deed, condemnation proceedings, compensation (just or otherwise), or any proceeding whatsoever, I have, by main force, hereby appropriated your property for this highway purpose to whatever limits and extents I desire. There's nothing you can do about it, either, for I'm the State of North Carolina and thereby immune to suit." This is what Petitioner says violates his constitutional rights. To enforce those constitutional rights Petitioner

says he is entitled to a writ of certiorari that this Court may adjudicate these important questions and that this Court may direct the issuance of such orders as will protect and preserve the constitutional rights of the people of the State of North Carolina, as well as this Petitioner.

To conform to the statute law and use one of the *three* prescribed methods for accuisition private property needed for its purposes would not hamper, delay, or hinder Respondent's operations. Such is provided for in the statute (G. S. § 136-19, Appendix A, page 14). Respondent's present methods are abuses of that provision which was made for its benefit. Again, it is those abuses that we here seek to abolish.

Citations of cases are relatively few. In this case we are not necessarily complaining of the invalidity of the statutes, but of the unconstitutionality of Respondent's misuse of the statutes. We feel that the law on taking property is so clear it would be a waste of space to give citations as to it.

Exhibits "A", "B", and "C", attached to Petitioner's original complaint in this action show that Petitioner has tried to lay the groundwork and preparations necessary for the "special proceeding as provided in G.S. § 40-12," by trying to obtain from Respondent a sufficient description of that part of Petitioner's real property which Respondent desires. However, it would seem clear from that correspondence that Respondent does not intend to comply with the mandate of the North Carolina Supreme Court in the first *Cannon* Case — unless, of course, the courts force it to do so. Respondent did not even bother to answer the letter set forth in Exhibit "C".

This cases strongly emphasizes the real meaning of § 29 of Article I of the Constitution of North Carol[illegible]:

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

W. P. BURKHIMER

H. EDMUND RODGERS
Counsel for Petitioner.

25 July 1956

APPENDIX

APPENDIX A

CONSTITUTION OF UNITED STATES OF AMERICA

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of; or *abridging* the freedom of speech or of the press; or *the right of the people* peaceably to assemble, and *to petition the government for a redress of grievances.* (Emphasis added).

AMENDMENT V

No Person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.* (Emphasis added).

AMENDMENT XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added).

CONSTITUTION OF NORTH CAROLINA

ARTICLE I

Declaration of Rights

That the great, general and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and Government of the United States, and those of the people of this State to the rest of the American People, may be defined and affirmed, we do declare:

§ 1. **The equality and rights of persons.** — That we hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. (Constitution 1868; 1945, c. 634, s. 1.)

§ 2. **Political power and government.**—That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole. (Constitution 1868.)

§ 9. **Of the power of suspending laws.**—All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. (Constitution 1868.)

§ 17. **No person taken, etc., but by law of land.** — *No person ought to be taken, imprisioned, or dissezed of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.* (Constitution 1868). (Emphasis added).

§ 18. **Persons restrained of liberty.**—Every person restrained of his liberty is entitled to a remedy to inquire

into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Constitution 1868.)

§ 19. **Controversies at law respecting property.**—In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. No person shall be excluded from jury service on account of sex. (Constitution 1868; 1945, c. 634, s. 1.)

§ 35. **Courts shall open.**—All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. (Constitution 1868).

§ 37. **Other rights of the people.**—This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people. (Constitution 1868.)

ARTICLE IV

§ 9. **Claims against the State.**—The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action. (Constitution 1868.)

General Statutes of North Carolina

§ 1-228. **Regarded as a deed and registered.**—Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules

and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (1850, c. 107, ss. 2, 4; R. C., c. 32, ss. 25, 27; 1874-5, c. 17, ss. 2, 4; Code, ss. 427, 429; Rev. ss. 567, 568; C. C., s. 608).

§§ 7-8. **Original jurisdiction.** — This Supreme Court has original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon, they shall be reported to the next session of the General Assembly for its action. (Rev., s. 1537; Constitution, Art. IV, s. 9; C. S. 1409.)

§§ 7-9. **Procedure to enforce claims against the State.** —Any person having any claim against the State may file his complaint in the office of the clerk of the Supreme Court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the Governor, and therein request him to appear on behalf of the State and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the State by the Governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the Supreme Court,

at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the Supreme Court. If the State shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The Supreme Court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the General Assembly at its next term. (Rev., s. 1538; Code, s. 948; C. S. 1410.)

§ 47-27. **Deeds of easements.**—All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within ninety days after the beginning of the use of the easements granted thereby. If after ninety days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after ten days' notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of said lease or agreement for registeration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the

same force and affect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

1. * * * *

2. * * * *

3. It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

4. * * * *

No deed, agreement for right of way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750.)

[Ed. Note: Subsections 1, 2, and 4 are omitted for the reason that they have no application to this case.]

§ 136-5. **Oath of office of commissioners.** — Before entering upon the performance of their duties, the chairman and each member of the State Highway and Public Works Commission shall take and subscribe to an oath of office before some person authorized to administer oaths that they *will faithfully support the Constitution of the State of North Carolina* and all laws enacted pursuant thereto and not inconsistent therewith, and that they will faithfully perform the duties of their respective offices. Said oaths shall be filed and preserved by the Commission as a part of its permanent records. (1921, c. 2, s. 6: C. S., s. 3846 (h); 1933, c. 172, s. 10.) (Emphasis added).

§ 136-6. **Bonds of commissioners and engineer.** — Before entering upon the performance of their duties,

the chairman and each member of the State Highway and Public Works Commission and the State Highway Engineer shall give a bond, to be fixed and approved by the Governor, conditioned upon the faithful discharge of the duties of their respective offices and the full and proper accounting for all public funds and property coming into their possession or under their control. The preimums on said bonds shall be paid out of the State Highway Fund. (1921, c. 2, s. 6; C. C., s. 3846(h); 1933, c. 172, s. 17.)

§ 136-18. **Powers of Commission.** — The said State Highway and Public Works Commission shall be vested with the following powers:

(a) The general supervision over all matters relating to the construction of the State highways, letting of contracts therefor, and the selection of materials to be used in the construction of State highways under the authority of this chapter.

(b) To take over and assume exclusive control for the benefit of the State of any existing county or township roads, and to locate and acquire rights of way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change or alter the grade or location thereof and to change or relocate any existing roads that the Commission may now own or may acquire; to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State highway system: Provided, all changes or alterations authorized by this sub-section shall be subject to the provisions of §§ 136-54 to 136-63, to the extent that said sections are applicable: Provided, that nothing in this chapter shall be construed to authorize or permit the Commission to allow or pay anything to any county, township, city or town, or to any board of commission-

ers or governing body thereof, for any existing road or part of any road heretofore constructed by any such county, township, city or town, unless a contract has already been entered into with the Commission.

(c) To provide for such road materials as may be necessary to carry on the work of the State Highway and Public Works Commission, either by gift, purchase, or condemnation; Provided, that when any person, firm or corporation owning a deposit of sand, gravel or other material, necessary, for the construction of the system of State highways provided herein, has entered into a contract to furnish the Commission any of such material, at a price to be fixed by said Commission, thereafter the Commission shall have the right to condemn the necessary right of way under the provisions of chapter forty, to connect said deposit with any part of the system of State highways or public carrier.

(d) To enforce by mandamus or other proper remedies all legal rights or causes of action of the State Highway and Public Works Commission with other public bodies, corporations, or persons.

(e) To make rules, regulations and ordinances for the use of, and to police traffic on, the State highways, and to prevent their abuse by individuals, corporations and public corporations, by trucks, tractors, trailers or other heavy or destructive vehicles or machinery, or by any other means whatsoever, and to provide ample means for the enforcement of same; and the violation of any of the rules, regulations or ordinances so prescribed by the Commission shall constitute a misdemeanor: Provided, no rules, regulations or ordinances shall be made that will conflict with any statute now in force or any ordnance of incorporated cities or towns, except the Commission may regulate parking upon any street which forms a link in the State highway system, if said street be maintained with State highway funds.

(f) To establish a traffic census to secure information about the relative use, cost, value, importance, and necessity of roads forming a part of the State highway system, which information shall be a part of the public records of the State, and upon which information the State Highway and Public Works Commission shall, after due deliberation and in accordance with these established facts, proceed to order the construction of the particular highway or highways.

(g) To assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system from date of acquiring said roads. The State Highway and Public Works Commission shall have authority to maintain all streets constructed by the Commission in towns of less than three thousand population by the last census, and such other streets as may be constructed in towns and cities at the expense of the Commission, whenever in the opinion of the Commission it is necessary and proper so to do.

(h) To give suitable names to State highways and change the names of any highways that shall become a part of the State system of highways.

(i) To employ appropriate means for properly selecting, planting and protecting trees, shrubs, vines, grasses or legumes in the highway right-of-way in the promotion of erosion control, landscaping and general protection of said highways; to acquire by gift or otherwise land for and to construct, operate and maintain roadside parks, picnic areas, picnic tables, scenic overlooks and other appropriate turnouts for the safety and convenience of highway users; and to co-operate with municipal or county authorities, federal agencies, civic bodies and individuals in the furtherance of these objectives. No such roadside parks, picnic areas, picnic

tables, scenic overlooks or other turnouts, or any part of the highway right-of-way shall be used for commercial purposes and every use or attempted use of any such area for commercial purposes shall constitute a misdemeanor and each day's use shall constitute a separate offense.

(j) To make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles, sign boards, fences, gas, water, sewerage, oil, or other pipe lines, and other similar obstructions that may, in the opinion of the Highway and Public Works Commission, contribute to the hazard upon any of the said highways or in anywise interfere with the same, and to make reasonable rules and regulations for the proper control thereof. And whenever the order of the said Commission shall require the removal of, or changes in, the location of telephone, telegraph, or other poles, sign-boards, fences, gas, water, sewerage, oil, or other pipe lines, or other similar obstructions, the owners thereof, shall at their own expense move or change the same to conform to the order of the said Commission. Any violation of such rules and regulations or non-compliance with such orders shall constitute a misdemeanor.

(k) To regulate, abandon and close to use, grade crossings on any road designated as part of the State highway system, and whenever a public highway has been designated as part of the State highway system and the State Highway and Public Works Commission, in order to avoid a grade crossing or crossings with a railroad or railroads, continues or constructs the said road on one side of the railroad or railroads, the Commission shall have power to abandon and close to use such grade crossings; and whenever an underpass or overhead bridge is to use such grade crossings, the Com-

mission shall have power to close to use and abandon such grade crossing and any other crossings adjacent thereto.

(l) The said State Highway and Public Works Commission shall have such powers as are necessary to comply fully with the provisions of the present or future federal aid acts. The said Commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction, improvement and maintenance of roads under the provisions of the present or future congressional enactments, to submit such scheme or program of construction or improvement and maintenance as may be required by the Secretary of Agriculture or otherwise provided by federal acts, and to do all other things necessary to carry out fully the co-operation contemplated and provided for by present or future acts of Congress, for the construction or improvement and maintenance of rural post roads. The good faith and credit of the State are further hereby pledged to make available funds necessary to meet the requirements of the acts of Congress, present or future, appropriating money to construct and improve rural post roads and apportioned to this State during each of the years for which federal funds are now or may hereafter be apportioned by the said act or acts, to maintain the roads constructed or improved with the aid of funds so appropriated and to make adequate provisions for carrying out such construction and maintenance. The good faith and credit of the State are further pledged to maintain such roads now built with federal aid and hereafter to be built and to make adequate provisions for carrying out such maintenance. Upon request the Commission and in order to enable it to meet the requirements of acts of Congress with respect to federal aid funds apportioned to the State of North Carolina, the State Trea-

surer is hereby authorized, with the approval of the Governo" and Council of State, to issue short term notes from time to time, and in anticipation of State highway revenue, and to be payable out of State highway revenue for such sums as may be necessary to enable the Commission to meet the requirements of said federal aid appropriations, but in no event shall the outstanding notes under the provisions of this section amount to more than two million dollars ($2,000,000.00).

(m) The Sate Highway and Public Works Commission is authorized and empowered to construct and maintain all walkways and driveways within the Mansion Square in the city of Raleigh including the approaches connecting with the city streets and any funds expended therefor shall be a charge against general maintenance.

(n) The State Highway and Public Works Commission shall have authority to provide roads for the connection of airports in the State with public highway system, and to mark the highways and erect signals along the same for the guidance and protection of aircraft.

(o) The State Highway and Public Works Commission shall have authority to provide facilities for the use of water-borne traffic by establishing connections between the highway system and the navigable waters of the State by means of connecting roads and piers.

(p) The State Highway and Public Works Commission shall have authority, *under the power of eminent domain* (Emphasis added) and under the same procedure as provided for the acquirement of rights of way, to acquire title in fee simple to parcels of land for the purpose of exchanging the same for other real property to be used for the establishment of rights of way or for the widening of existing rights of way or the clearing of obstructions gerous hazards at intersections. Real property may be

acquired for such purposes only when the owner of the property needed by the Commission has agreed in writing to accept the property so acquired in exchange for that to be used by the Commission, and when, in the opinion of the Commission, an economy in the expenditure of public funds and the improvement and convenience and safety of the highway can be effected thereby.

(q) The State Highway and Public Works Commission is hereby authorized and required to maintain and keep in repair, sufficient to accommodate the public school buses, roads leading from the State-maintained public roads to all public schools and public school buildings to which children are transported on public school buses to and from their homes. And said commission is further authorized to maintain and repair sufficient parking facliities for the school buses at those schools.

(r) To administer, through the Division of Prisons, the State Prison System.

(s) To co-operate with appropriate agencies of the United States in acquiring rights of way for and in the construction and maintenance of flight strips or emergency landing fields for aircraft adjacent to State highways.

(t) To prohibit the erection of any informational, regulatory, or warning signs within the right of way of any highway project built within the corporate limits of any municipality in the State where the funds for such construction are derived in whole or in part from federal appropriations expended by the State Highway and Public Works Commission, unless such signs have first been approved by the State Highway and Public Works Commission. (1921, c. 2, s. 10; 1923, c. 160, s. 1; 1923, c. 172; 1933, c. 517, s. 1; 1935, c. 213 s. 1; 1935, c. 301; 1938 c. 297, s. 2; 1937, c. 407, s. 80; 1941, c. 47;

1941, c. 217, s. 6; 1943, c. 410; 1945, c. 842; 1951, c. 372; 1953, c. 437.)

§ 136-19. **Acquirement of land and deposits of materials; condemnation proceedings; federal parkways.** — *The State Highway and Public Works Commission is vested with the power to acquire such rights of way and title to such land, gravel, gravel beds, or bars, sand, sand beds or bars, rock, stone, boulders, quarries, or quarry beds, lime or other earth or mineral deposits or formations, and such standing timber as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work,* **either by purchase, donation, or condemnation,** *in the manner hereinafter set out.* (Emphasis added) The Commission is also vested with the power to acquire such additional land alongside of the rights of way or roads as in its opinion may be necessary and proper for the protection of the roads and roadways, and such additional area as may be necessary as by it determined for approaches to and from such material and other requisite area as may be desired by it for working purposes.

Whenever the Commission and the owner or owners of the lands, materials, and timber required by the Commission to carry on the work as herein provided for, are unable to agree as to the price thereof, the Commission is hereby vested with the power to condemn the lands, materials, and timber, and in so doing the ways, means, methods, and procedure of chapter 40, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this section. (Emphasis added) and in all instances the general and special benefits shall be assessed as offsets against damages: Provided, that in all cases where the State Highway and Public Works

Commission upon the completion of the particular project, posts a notice at the courthouse door in each county wherein any part of the particular project is situate, and posts such notice in appropriate and suitable size at each end of the project for thirty (30) days to the effect that the project was completed as of a certain date named in the notice, any action for damages for rights of way or other causes shall be brought within six months from the date such notice was posted, and in all cases where the State Highway and Public Works Commission does not post notice as above set forth, any action may be brought within twelve months from the date of the completion of a particular project; Provided, however, that in no event shall the completion of a particular project be construed to be any date or time prior to the opening of the particular part or section of road in question to public use in a completed state.

In case condemnation shall become necessary the Commission is authorized to enter the lands and take possession of the same, and also take possession of such materials and timber as is required by it prior to bringing the proceedings for condemnation, and prior to the payment of the money for the said property. (Emphasis added.)

In the event the owner or owners shall appeal from the report of the commissioners, it shall not be necessary for the Commission to deposit the money assessed with the clerk, but it may proceed and use the property to be condemned until the final determination of the action.

The State Highway and Public Works Commission shall have the same authority, under the same provisions of law hereinbefore provided for construction of State highways, for the acquirement of all rights of way and easements necessary to comply with the rules and regulations of the United States government for the con-

struction of federal parkways in the State of North Carolina. The acquirement of a total of one hundred and twenty-five acres per mile of said parkways, including roadway and recreational and scenic areas on either side thereof, shall be deemed a reasonable area for said purpose. The right of way acquired or appropriated may at the option of the Commission, be a fee simple title, and the nature and extent of the right of way and easements so acquired or appropriated shall be designated upon a map showing the location across each county, and when adopted by the Commission, shall be filed with the registered of deeds in each county, and, upon the filing of said map, such title shall vest in the State Highway and Public Work Commission. The said Commission is hereby authorized to convey such title so acquired to the United States government, or its appropriate agency, free and clear of all claims for compensation. All compensation contracted to be paid or legally assessed shall be a valid claim against the State Highway and Public Work Commission, payable out of the construction fund of said Commission.

The action of the State Highway and Public Works Commission heretofore taken in the acquirement of areas for the Blue Ridge Parkway in accordance with the rules and regulations of the United States government is hereby ratified and approved and declared to be a reasonable exercise of the discretion vested in the said Commission in furtherance of the public interest.

When areas have been tentatively designated by the United States government to be included within a parkway, but the final survey necessary for the filing of maps as provided in this section has not yet been made, no person shall cut or remove any timber from said areas pending the filing of said maps after receiving notice from the State Highway and Public Works Commission that such area is under investigation; and any prop-

erty owner who suffers loss by reason of the restraint upon his right to use the said timber pending such investigation shall be entitled to recover compensation from the State Highway and Public Works Commission for the temporary appropriation of his property, in the event the same is not finally included within the appropriated area, and the provisions of this section may be enforced under the same law now applicable for the adjudgment of compensation in the acquirement of rights of way on other property by the State Highway and Public Works Commission. (1921, c. 2, s. 22; 1923, c. 160, s. 6; C. S., s. 3846(bb); 1931, c. 145, s. 23; 1933, c. 172, s. 17; 1935, c. 2; 1937, c. 42; 1949, c. 1115; 1953, c. 217.)

[Ed. Note: All of G. S. §§ 136-18 and 136-19 are set forth in this Appendix in order that the Court may see that no authority is granted for the police state methods used by Respondent. Therefore, we apologize for the great length needed to present these statutes.]

APPENDIX B

JUDGMENT

NORTH CAROLINA SUPREME COURT
FALL TERM 1955

No. 171 — New Hanover

W. A. CANNON

v.

CITY OF WILMINGTON, NORTH CAROLINA, AND NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION

Appeal by plaintiff from Sink, Emergency Judge, May Civil Term, 1955, of New Hanover.

The complaint, summarized, alleges: (1) that plaintiff is the owner and *in possession* of a described tract of land in the subdivision known as "Sunset Park" Wilmington, North Carolina; (2) that defendants claim an estate or interest adverse to plaintiff, to wit, a perpetual right of way or easement on and over said land for a city street and State highway, but have not made or attempted to make any use of such right of way or easement except over a described area at the southern end of said tract; (3) that "the said claim of the defendants is not valid either in law or in fact because neither of the defendants has, in any manner or way, obtained any valid legal or equitable title thereto, by deed, conveyance, or any process of law, or otherwise, nor have either of the defendants in any way or manner compensated the plaintiff for the said property, estate, or interest therein which they so claim"; (4) that said ad-

verse claims constitute a cloud upon plaintiff's title and on account thereof plaintiff has been damaged in relation to his ability to use, rent or sell his land; and (5) that "the defendants have done nothing to limit, bound, and describe their said claims."

Plaintiff prays (1) for removal of the cloud on title allegedly caused by defendants' adverse claims, (2) for recovery of damages of $70,000.00 allegedly caused by such adverse claims, if such adverse claims are removed by judgment herein, or (3) in the event defendants' right of way claims are adjudged valid to recover $106,200.00 as compensation for the taking of plaintiff's land for such public use.

Each defendant demurred separately to the complaint.

Upon the hearing below, the court entered separate judgments sustaining the demurrers. Plaintiff appealed from each judgment; and upon appeal plaintiff assigns error as to each judgment.

W. P. Burkhimer for plaintiff, appellant.

Wm. B. Campbell and Louis J. Poisson, Jr., for defendant City of Wilmington, appellee.

R. Brookes Peters, General, Counsel, and Louis J. Poisson, Jr., Associate Counsel, for defendant North Carolina State Highway and Public Works Commission, appellee.

BOBBITT, J. The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute. *Moore* v. *Clark*, 235 N. C. 364, 70 S.E. 2d 182, and cases cited. Hence, the demurrer of the defendant Commission, grounded on the court's lack of jurisdiction to entertain this action against it, was properly sustained.

True, when private property is *taken* under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefore. *Sale* v. *Highway Comm.*, ___ N.C. ___, ___ S.E. 2d ___; *Eller* v. *Board of Education*, ___ N.C. ___, ___ S.E. 2d ___. But this exception to the general rule has no application here.

Here plaintiff alleges expressly, as set out above, that defendant Commission has no valid claim of right of way over plaintiff's land. Rather, plaintiff seeks to remove as a cloud on plaintiff's title defendant Commission's alleged *invalid* adverse claims.

If and when defendant Commission, in the exercise of the power of eminent domain conferred upon it by statute, G.S. 136-19 and G.S. 40-12 et seq., takes plaintiff's land or any interest therein for highway purposes, plaintiff's remedy is by special proceeding as provided in G.S. 40-12.

Plaintiff declares that he is aggrieved because defendants have done nothing "to limit, bound, and describe with particularity the boundaries of their said claims." **Certainly, if defendant Commission claims a right of way over plaintiff's land, plaintiff is entitled as a matter of right to require that defendant define with particularity the location and extent of its claim; and, if it refuses or fails to do so, plaintiff can invoke the remedy of mandamus.** The statutory procedure described in G.S. 40-12 for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with certainty the exact limits of the appropriation made by defendant Commission. (Emphasis added.)

Defendant City of Wilmington demurred for that it appears upon the face of the complaint "that this action has been instituted to determine the taking of and the location of the highway right of way by the defendants over a portion of the area referred to in the Complaint, and that the Court has no jurisdiction of the parties with respect to the alleged cause of action and no jurisdiction of the alleged civil action as set out in the Complaint; and for that it further appears upon the face of the Complaint that the alleged cause of action is based upon trespass by the defendants, who separately and jointly are by law vested with the power of eminent domain."

The contention of defendant City that the court lacks jurisdiction to entertain this action is without merit. The rule applicable to defendant Commission does not apply to a municipal corporation. A municipal corporation may "sue and be sued in its corporate name." G.S. 160-2.

Here plaintiff alleges that defendant City claims, without legal right thereto, a right of way on and over his land, and that such claim is a cloud on his title. The demurrer admits the facts stated in these allegations. Hence, nothing else appearing, the complaint contains allegations of fact sufficient to state a cause of action within the purview of G.S. 40-10, which provides for an action to remove a cloud from title.

Since the complaint states one cause of action against defendant City, this is sufficient ground for overruling its demurrer. *Kindley* v. *Privette*, 241 N.C. 140, 84 S.E. 2d 660, and cases cited. Hence, we do not discuss whether plaintiff has alleged facts sufficient to constitute a cause of action for damages against defendant City.

The motion by defendant City to dismiss the appeal under Rule 21 is denied. The appeal itself is considered an exception to the judgment and any other matters

appearing upon the face of the record. The pleadings are part of the record proper. *Gibson* v. *Ins. Co.*, 232 N.C. 712, 62 S.E. 2d 320.

As to demurrer of defendant State Highway and Public Works Commission: Affirmed .

The conclusions reached are: the judgment sustaining the demurrer of the defendant Commission is affirmed; and the judgment sustaining the demurrer of the defendant City is reversed. The costs on appeal are to be paid, one-half by the plaintiff and one-half by the Defendant City.

As to demurrer of defendant City of Wilmington: Reversed.

Winborne and Higgins, JJ., took no part in the consideration or decision of this case.

Office - Supreme Court, U.S.
FILED
AUG 20 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, *Petitioner*

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina.

APPENDIX C

W. P. BURKHIMER,
28 Odd Fellows Bldg.
Wilmington, N. C.

H. EDMUND RODGERS,
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Wilmington, N. C.

Counsel for Petitioners.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Laws Involved	4
Statement	4
Reasons for Granting the Writ	7
Conclusion	18

	Appendix Page
APPENDIX A	
U. S. Constitutional Provisions	1
N. C. Constitutional Provisions	2
Statutes	4
APPENDIX B	
Opinion in *Cannon* v. *City*	18
APPENDIX C	
Judgment in *This* Case	23 (See Supplement)

TABLE OF CASES CITED

Cannon v. *City of Wilmington*, et al., 242 N. C. 711, 89 S. E. 2d 595 (1955) 2, 6, 7, 8, 11, 13, 17

Eason v. *Spence*, 232 N. C. 579, 61 S. E. 2d 717 10

Eller v. *Board of Education*, 242 N. C. 584, 89 S. E. 2d 144 (1955) 10, 11

Ivester v. *City of Winston-Salem*, 215 N. C. 1, 1 S. E. 2d 88 ..... 8, 10

McKinney v. *City of High Point*, 237 N. C. 66, 74 S. E. 2d 440 (1953) 8, 11

McKinney v. *City of High Point*, 239 N. C. 232, 79 S. E. 2d 730 (1954) 8

Moore v. *Clark*, 235 N. C. 364, 70 S. E. 2d 182 (1952) 8

Proctor v. *State Highway, etc., Comm.*, 230 N. C. 687, 55 S. E. 2d 479 (1949) 8, 10

Rhodes v. *City of Durham*, 165 N. C. 679, 81 S. E. 938 8

Sale v. *State Highway and Public Works Commission*, 242 N. C. 612, 89 S. E. 2d 290 (1955) 10, 11

Sanders v. *Atlantic Coast Line R. Co.*, 216 N. C. 312, 4 S. E. 2d 902 10

TABLE OF LAWS CITED

CONSTITUTIONAL PROVISIONS

	Page
Preamble to U. S. Constitution	14
First Amendment to U. S. Constitution	4
Fifth Amendment to U. S. Constitution	3, 4, 6, 8, 15
Fourteenth Amendment to U. S. Constitution, § 1	3, 4, 6, 14, 15

NORTH CAROLINA CONSTITUTION

Article I

§ 1	3, 4
§ 2	4
§ 9	3, 4
§ 17	3, 4, 6, 8, 10, 17
§ 18	4, 14
§ 19	3, 4, 14
§ 29	4, 17, 18
§ 35	3, 4, 14
§ 37	4, 16
Article IV, § 9	1, 4, 6

STATUTES

28 U. S. C., § 1257(3)	2

General Statutes of North Carolina:

§ 1-228	4, 12
§ 7-8	1, 4, 6
§ 7-9	1, 4, 6
§ 40-12 (Chapt. 40, "*Eminent Domain*")	8, 10, 11, 17
§ 47-27	4, 12
§ 136-5	4, 6
§ 136-6	4, 6
§ 136-18	4, 6
§ 136-19	4, 6, 10, 17

APPENDIX C

JUDGMENT

NORTH CAROLINA SUPREME COURT
SPRING TERM, 1956

W. A. CANNON

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION

No sufficient cause having been made to appear why the Court should issue the order applied for, the application is denied at the costs of the applicant.

This 21st day of March, 1956.

HIGGINS, J.,
For the Court.

Office - Supreme Court, U.S.
FILED
AUG 29 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, PETITIONER,

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR RESPONDENT IN OPPOSITION

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AUGUST 27, 1956

INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Laws Involved 2

Statement 2

Argument 3

I. That there is no federal question involved and that he has never brought himself under the provisions of the federal statute 3

II. That there was no proceeding properly instituted 3

Conclusion 11

Appendix

Letter to Chief Justice Barnhill 12

CITATIONS

Cases:

BEAR v. COMMISSIONERS, 124 NC 204, 32 SE 558 ..... 5, 9

BLEDSOE v. THE STATE, 64 NC 392 ..... 6, 7

BOARD OF MANAGERS OF JAMES WALKER MEMORIAL HOSPITAL v. WILMINGTON, 235 NC 597, 70 SE 2d 833 6

CALKINS DREDGING CO. v. STATE, 191 NC 243, 131 SE 665 7

CENTRAL VERMONT RAILWAY CO. v. WHITE, 238 US 507, 59 L. ed. 1433 4

CHICAGO v. HASLEY, 25 Ill. 595 5

MARYLAND CASUALTY CO. v. COMRS. OF SALUDA, 214 NC 235, 199 SE 7 5

REYNOLDS v. THE STATE, 64 NC 460 ..... 6, 7

ROTAN v. STATE, 195 NC 291, 141 SE 733 7

SOUTHWESTERN BELL TELEPHONE CO. v. STATE OF OKLAHOMA, 303 US 206, 82 L. ed. 751, 755 4

UNITED STATES v. OSWEGO, 28 Fed. 55 5

WILKINSON v. BOARD OF EDUCATION, 199 NC 669, 155 SE 562 6

Constitution:

N. C. Const., Art. IV, § 9 5

Statutes:

28 USC § 1257(3) 4

G. S. § 1-1 9

G. S. § 1-2 9

G. S. § 1-3 9

G. S. § 1-88 9

G. S. § 1-88.1 10

G. S. § 1-393 10

G. S. § 1-394 10

G. S. § 1-511 9

G. S. § 7-8 5

G. S. § 7-9 5

IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

There has been issued no opinion in the instant case unless the order entered 21 March, 1956, denying petitioner the relief prayed for should be so considered. That order appears as Appendix "C," Petitioner's Brief, p. 23. The opinion in the original case, entitled "W. A. CANNON v. CITY OF WILMINGTON, NORTH CAROLINA, and NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION," filed 12 October, 1955, is reported in 242 NC 711, (89 SE 2d 595). (Br. Appendix "B," pp 18-22).

JURISDICTION

The jurisdiction of this Court is sought to be invoked under the provisions of 28 USC § 1257(3). It is doubtful that a federal question is presented.

QUESTIONS PRESENTED

I. WHETHER THERE IS ANY FEDERAL QUESTION INVOLVED.

II. WHETHER ANY PROCEEDING FOR MANDAMUS HAS EVER BEEN PROPERLY INSTITUTED.

LAWS INVOLVED

The Federal Statute under which the jurisdiction of this Court is attempted to be invoked is 28 USC § 1257(3).

The statutory provisions involved are North Carolina General Statutes, § 1-1; § 1-2; § 1-3; § 1-88; § 1-88.1; § 1-393; § 1-394; § 1-511; § 1-513; § 136-18 and § 136-19.

STATEMENT

On the 28th day of February, 1955, the petitioner brought a civil action in the Superior Court of New Hanover County against the City of Wilmington, North Carolina, and the North Carolina State Highway and Public Works Commission, in which the petitioner, therein designated "plaintiff," sought to remove an alleged cloud on title to a portion of a certain piece of property located in the City of Wilmington. In apt time the North Carolina State Highway and Public Works Commission and the City of Wilmington each filed a demurrer. The demurrers were heard by the presiding judge at the May, 1955, Term of the New Hanover County Superior Court and both demurrers were sustained. Plaintiff appealed to the Supreme Court of North Carolina. By opinion filed 12 October, 1955, the Supreme Court affirmed the judgment sustaining the demurrer as to the Commission and reversed the judgment sustaining the demurrer as to the City of Wilmington. (CANNON v. WILMINGTON, 242 NC 711, 89 SE 2d 595; Appendix B, pp 18-22, Petitioner's Brief.)

On or about 20 March, 1956, petitioner, therein designated "plaintiff," filed a complaint with the Supreme Court of North Carolina seeking a writ of mandamus against the Governor of the State and the State Highway and Public Works Com-

mission, (Transcript pp 1-6) to which complaint were attached three exhibits. (Transcript pp 7-9) No summons was issued. (Transcript pp 10-11) Order was entered 21 March, 1956, by the Court denying the relief sought. (Transcript p 12). It is this order that petitioner seeks a writ of certiorari to have this Court review. (Petitioner's Brief p 1).

ARGUMENT

In his brief petitioner enumerates three questions, listing them. (Brief pp 3-4). He divides his argument into three parts:

1. That the decisions of the North Carolina Supreme Court in denying his application for writ of mandamus and in the original case are in conflict with the provisions of the Constitution of the United States, the Constitution of North Carolina and the Statutes of North Carolina; (Brief pp 7-11);

2. That the instant case is of great importance to determine whether these acts conform to the duties of respondent to the people of North Carolina as defined in the State and Federal Constitutions; (Brief pp 12-13) and

3. That the decisions of the Supreme Court below are clearly erroneous. (Brief pp 13-18).

Respondent respectfully contends that petitioner is not entitled to have the writ of certiorari issued by this Court to the Supreme Court of North Carolina on two major grounds:

I. That there is no federal question involved and that he has not brought himself under the provisions of the federal statute.

II. That there was no proceeding ever properly instituted.

I.

WHETHER THERE IS ANY FEDERAL QUESTION INVOLVED.

28 USC § 1257. "STATE COURTS; APPEAL; CERTIORARI. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under, the United States."

This Court has "repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." SOUTHWESTERN BELL TELEPHONE COMPANY v. STATE OF OKLAHOMA, 303 US 206, 82 L. ed. 751, 755. Also that assignments of error which involved no federal question cannot be considered. See CENTRAL VERMONT RAILWAY COMPANY v. WHITE, 238 US 507, 59 L. ed. 1433.

Respondent respectfully contends that there is no federal question involved in the proceeding for which writ of certiorari is now sought. In fact, respondent respectfully contends that no proceeding was ever instituted; that, therefore, the order of the North Carolina Supreme Court from which certiorari is sought is not a final judgment of a State court of last resort.

II.

WHETHER PETITIONER EVER INSTITUTED PROPER PROCEEDING SEEKING A WRIT OF MANDAMUS.

Respondent respectfully contends that petitioner never instituted any proceeding. Petitioner's complaint filed with the Supreme Court of North Carolina on or about the 20th day of March, 1956, was considered by him to be an "application for writ of mandamus." (Brief p 6) It was filed in the Supreme Court of North Carolina under the provisions of Section 9, Article IV, of the Constitution of North Carolina and §§ 7-8 and 7-9 of the General Statutes of North Carolina. (Brief p 6)

North Carolina Constitution, Article IV, § 9 "CLAIMS AGAINST THE STATE.—The Supreme Court shall have the original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; *no process in the nature of execution shall issue thereon;* they shall be reported to the next session of the General Assembly for its action." (Emphasis added)

GS 7-8: "ORIGINAL JURISDICTION. The Supreme Court has original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; *no process in the nature of execution shall issue thereon;* they shall be reported to the next session of the General Assembly for its action." (Emphasis added)

GS 7-9. (See Br. Appendix, pp 4-5)

These statutes have been construed by our Court as follows:

BEAR v. COMMISSIONERS, (1899), 124 NC 204, 207: ". . . though *mandamus is in the nature of an execution,* . . ." (Emphasis added).

CASUALTY CO. v. COMRS. OF SALUDA (1938), 214 NC 235, 238: "*Mandamus* is as much an instrument of enforcement at law as it is an aid in equity and, as sought here, may be considered the equivalent of execution. BEAR v. COMRS., 124 NC 204, 210, 32 SE 558; US v. OSWEGO, 28 Fed. 55; CHICAGO v. HASLEY, 25 Ill. 595."

HOSPITAL v. WILMINGTON, (1952) 235 NC 597, 601: "And a writ of *mandamus* is final in its nature. . . . *Mandamus* . . . is essentially a coercive writ; one that commands performance, not desistance. . . . Such writ will not be issued to enforce an alleged right which is in question. . . . *Mandamus* lies only to enforce a clear legal right and will be issued only when there is no other legal remedy. . . . 'The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established.' WILKINSON v. BD. OF EDUCATION, 199 NC 669, 155 SE 562."

WILKINSON v. BOARD OF EDUCATION, (1930) 199 NC 669, 673, "The right sought to be enforced must be clear and complete; the writ will not be issued to enforce an alleged right which is in doubt. (Citing cases)"

From these cases, and particularly the BEAR case, it appears that the very Constitutional provision and the statutes which petitioner claims support his right to the writ, contain provisions that would prohibit the Supreme Court from granting the writ prayed for.

BLEDSOE v. THE STATE (1870) 64 NC 392, 394: "Construing the two sections together, we are of the opinion that it was not contemplated that when a claim is presented against the State there shall be a 'trial' of the facts in detail, but only that we should decide such questions of law as may seem to be involved, together with our own impression of the facts generally, so as to make our decision of the law intelligible."

REYNOLDS v. THE STATE (1870) 64 NC 460: "We are fully satisfied, on a perusal of the papers in the proceeding, of the correctness of the view taken in BLEDSOE v. STATE, *ante*, 392, to-wit, that our 'recommendatory jurisdiction' in regard to claims against the State does not embrace cases involving mere matters of fact, and that it was not the intention of the framers of the Constitution to impose upon the Court the labor of the trial of facts, and that the jurisdiction is confined to claims where, the facts being agreed on, it was supposed an opinion of the Supreme Court on important questions of law would aid the General Assembly to dispose of such cases; it having been before a question whether the Judges could, con-

sistently with their constitutional duties, communicate an opinion to the Legislature."

DREDGING COMPANY v. STATE, (1926) 191 NC 243, 249: "The Court has no power to render judgment upon a claim against the State, adjudicating finally the rights of the claimant or of the State with respect to said claim. *No process in the nature of execution may issue upon any decision which the Court may make*, after hearing a claim against the State to enforce the same. The General Assembly is in no wise bound by the decision of this Court upon the validity or invalidity of such claim. It may take such action upon the claim, if presented to it, as it deems just and proper, and in accordance with a sound public policy. The recommendation of this Court will have such influence only upon the action of the General Assembly as its members shall deem it entitled to." (Emphasis added)

In this opinion the Court approved the previous opinions of BLEDSOE v. THE STATE, 64 NC 393, and REYNOLDS v. THE STATE, 64 NC 460, quoted above. (p 250)

In ROTAN v. STATE (1929) 195 NC 291, this Court said, p 296: ". . . the jurisdiction, however, is clearly defined and carefully limited by the provisions of the Constitution. Neither the State nor the General Assembly is bound by any decision made by this Court, with respect to a claim against the State, whether such decision be favorable or unfavorable to the claimant. Our decisions are merely recommendatory. They may be accepted or rejected by the General Assembly, which alone has the power to determine whether or not the claim is just, or whether or not a sound public policy requires that it shall be paid or settled."

pp 296-297: "The Superior Courts of the State had ample jurisdiction with respect to an action by claimants herein to recover of the State or its agency, the Tax Commission, the money paid by them on 2 December, 1920. Claimants did not avail themselves of the right, conferred by statute, to bring such action. The fact that they have lost their right to recover said sum in an action against the State, prosecuted in the Superior Court, furnishes no ground upon which they are entitled to invoke the original jurisdiction of this Court, with respect to their claim. This

Court, in the exercise of its original jurisdiction, conferred by the Constitution, will hear and consider a claim against the State only where the claimant has, or has had, no right of action against the State to recover upon his claim in a court of competent jurisdiction, by the consent of the State, expressly conferred by statute, to render final judgment against the State upon such claim and to enforce such judgment by process in the nature of execution. The jurisdiction of this Court, by virtue of which it may decide only issues of law involved in a claim against the State, its decisions then being only recommendatory, cannot be invoked by a claimant who has failed or neglected to pursue a remedy authorized by statute, which would have afforded him complete relief. Such remedy is exclusive."

In view of the principle laid down in the last opinion quoted above, from some of the allegations of the complaint and from statements in the exhibits attached thereto, it would appear that W. A. Cannon, the petitioner, had a right to bring an action against the Highway Commission when the street or road carrying US 421 across the front of his property was widened under Highway Project 3590 in the year 1939, (Exhibit "B," Transcript, p 9), for compensation for the appropriation of an additional width of right of way, if in fact additional width was appropriated at that time. Having failed to do so then, within the time provided by law, the petitioner had no right to seek relief from the Supreme Court in the manner attempted in this case.

That petitioner had the right at that time was clearly expressed in GS 136-19, which is quoted in its present form in the appendix to petitioner's brief, pp 14-17. The only difference between the section as it existed in 1939 and as it exists today is found in the proviso, which begins after the word "damages" appearing in the next to the bottom line of page 14. As it existed when Project 3590 was completed in 1939, this proviso read as follows: "Provided, that all actions for damages for rights of way or other causes shall be commenced within six months from the completion of each particular project."

Therefore, under the provisions of the Constitution of North Carolina and the Statutes of North Carolina, as interpreted by the Supreme Court of North Carolina, the petitioner had no right to bring the action as he did. Certainly, no federal question is involved in the Supreme Court's denial of his petition.

The statutes of North Carolina provide how a petition for mandamus shall be brought.

GS 1-511: "BEGUN BY SUMMONS AND VERIFIED COMPLAINT. All applications for writs of mandamus must be made by summons and complaint, which must be duly verified."

Our Supreme Court has said: ". . . though *mandamus* is in the nature of execution, yet it is in the nature of a civil action; it is commenced by summons, and the pleadings and the practices are the same as are prescribed for the conducting of civil actions." BEAR v. COMMISSIONERS, (1899) 124 NC 204, 207.

With regard to the definition of a civil action and as to how it should be commenced, our Statutes say:

GS 1-1. "REMEDIES.—Remedies in the courts of justice are divided into—

"1. Actions.
"2. Special proceedings."

GS 1-2. "ACTIONS.—An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense."

GS 1-3. "SPECIAL PROCEEDINGS. — Every other remedy is a special proceeding."

GS 1-88. "CIVIL ACTIONS; HOW COMMENCED. — A civil action is commenced by the issuance of summons or, when service is to be had pursuant to GS 1-98 or 1-104, by the filing of the affidavit therein required. No summons need

issue in a controversy without action or in case of a confession of judgment without action."

GS 1-88.1. "WHEN SUMMONS ISSUED.—A summons is issued when, after being filled out and dated, it is signed by the officer having authority so to do. The date the summons bears is prima facie evidence of the date of issuance."

As to special proceedings:

GS 1-393. "CHAPTER APPLICABLE TO SPECIAL PROCEEDINGS.—The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided."

GS 1-394. "CONTESTED SPECIAL PROCEEDINGS; COMMENCEMENT; SUMMONS. — Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. . . ."

Petitioner did not follow the procedure prescribed, therefore, respondent contends that no suit—for mandamus or otherwise—was ever properly instituted. If no suit was ever instituted, the order of 21 March, 1956, was no final judgment—no final word of a final court. If it is not a final judgment of a court of last resort, it is not reviewable by this Court.

Before finally concluding respondent respectfully directs the Court's attention to a letter attached as an appendix to this brief. In this letter of December 16, 1955, to the Chief Justice of the North Carolina Supreme Court the General Counsel of respondent relates what had been done, pursuant to the request of the court, to point out to petitioner, his attorney and his surveyor the location of the boundaries of the right of way. This should be considered along with the description appearing in the letter to petitioner's attorney, dated February 10, 1956, EXHIBIT "B" attached to the complaint, (Transcript, p 9), to show compliance with the request of the court to define the boundaries claimed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

R. BROOKES PETERS, *General Counsel*,
North Carolina State Highway and
Public Works Commission,
Raleigh, North Carolina

ATTORNEY FOR RESPONDENT

APPENDIX

December 16, 1955

Hon. M. V. Barnhill
Chief Justice
North Carolina Supreme Court
Raleigh, N. C.

Re: W. A. Cannon v. City of Wilmington, NCSH&PWC
No. 171, Fall Term, 1955.

Dear Justice Barnhill:

You may recall that when the above captioned matter was argued you inquired of me if we could not have our engineers point out to the petitioner the boundaries of the right of way of the highway across the property involved. Our engineers were requested to arrange for a conference with representatives of the City and the petitioner and his attorney, for the purpose of this.

We are today in receipt of a letter from our Right-of-way Engineer for the 3rd Division, whose office is in Wilmington, which says in part as follows:

> "As per your letter of Sept. 21, 1955, Mr. Louis J. Poisson, Jr. and myself met this morning with Mr. Burkheimer, attorney for Mr. Cannon, and pointed out to him and his surveyor, Mr. Lander, the east right-of-way line of US 421, or the Carolina Beach Road, which is the back of a 6' concrete sidewalk which fronts along this property. Also present were Mr. Cicero Yow, city attorney, and Mr. Robert Coleman, city engineer."

We believe now that we have pointed out the right-of-way boundary to the petitioner in a manner which we hope is definite and clear to him and his attorney. We trust that this meets with your approval as sufficient compliance with your request.

With every good wish and personal regards, particularly every good wish for you and yours for this Christmas Season, I remain

Respectfully,

R. BROOKES PETERS
GENERAL COUNSEL

RBP:vl
cc: Mr. T. B. Wilson
Mr. W. D. Moon
Mr. Louis J. Poisson, Jr.

Office - Supreme Court, U.S.
FILED
SEP 19 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, *Petitioner*

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, *Respondent*

Petitioner's Brief in Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari

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INDEX

Page No.

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Laws Involved 2

Statement 2

Argument 3

I. Whether Any Federal Question Involved 3

A. Federal Question is involved that private property has been appropriated to public use without just compensation and without due process of law 3

B. Federal question is involved that N. C. courts refusal to entertain Petitioner's actions to enforce his Constitutional rights denies him equal protection of the laws 5

C. Federal question is involved that Petitioner is denied any remedy to enforce his Constitutional rights 6

D. Federal question is involved that Petitioner has been denied due process of law by the decision of the N. C. courts and the acts of the Respondent 7

II. Whether There Has Been a Final Judgment 9

A. Proceeding for mandamus "instituted" 9

Comment on Respondent's citations 11

B. The judgment is final 12

Conclusion 14

TABLE OF CITATIONS

American Exp. Co. v. *Michigan (American Exp. Co.* v. *Maynard)*
177 U.S. 404, 44 L. Ed. 823, 20 Sup.Ct.Rep. 695 13

Angel v. *Bullington*, N.C.1947
330 U.S. 183, 91 L. Ed. 832, 67 S.Ct. 657 ..... 7, 8

Atchison T. & S. F. R. Co. v. *Public Utilities Commission of California*, Cal.1953, 346 U.S. 346, 98 L. Ed. 51, 74 S.Ct. 97 10

Backus v. *Fort Street Union Depot Co.*, Mich.1898
169 U.S. 557, 42 L. Ed. 853, 18 S.Ct. 445 ..... 3, 4, 5, 6

Baltimore & Potomac R. Co. v. *Hopkins*, Dist.Col.1889
130 U.S. 210, 32 L.Ed. 908, 9 S.Ct. 503 3

Bandini Petroleum Co. v. *Superior Court*, Cal.1931
284 U.S. 8, 76 L. Ed. 136, 52 S.Ct. 103 ..... 10, 11

Page No.

Bear v. *Commissioners* (1899)
124 N.C. 204, 32 S.E. 558 11

Boyd v. *Thayer*
143 U.S. 135 9

Broderick v. *Rosner*
294 U.S. 629, 55 S.Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 .. 7

Cannon v. *City of Wilmington, N.C., & N. C. State Highway & Public Works Commission* (1955)
242 N.C. 711, 89 S.E. 2d 595 ..... 2, 6

Casualty Co. v. *Commissioners of Saluda* (1938)
214 N.C. 235, 199 S.E. 7 11

Central Transp. Co. v. *Pullman's Car Co.*
139 U.S. 24, 35 L. Ed. 55, 11 Sup.Ct.Rep. 478 13

Cherokee Nation v. *Southern Kansas Railway*
135 U.S. 641, 34 L. Ed. 295 5

Chicago & E. I. R. Co. v. *Industrial Commission*, Ill.1932
285 U.S. 296, 76 L. Ed. 304, 52 S.Ct. 151 ..... 9-10, 10, 11, 13

Chicago, Burlington, & Q. R. Co. v. *Chicago*, Ill. 1897
166 U.S. 226, 41 L. Ed. 979, 17 S.Ct. 581 ..... 4, 6, 8

Davies v. *Corbin*
112 U.S. 36, 28 L. Ed. 627, 5 Sup.Ct.Rep. 4 13

Davis v. *Wechler*
263 U.S. 22, 44 S.Ct. 13, 68 L. Ed. 143 8

Detroit & Mackinac R. Co. v. *Michigan Railroad Commission*, Mich.1916, 240 U.S. 564, 60 L. Ed. 802, 36 S.Ct. 424 .. 9, 11, 13

General Oil Co. v. *Crain*, Tenn.1908
209 U.S. 211, 52 L. Ed. 754, 28 S.Ct. 475 ..... 4, 5, 6, 11, 13

Hammerstein v. *Superior Court*, Cal.1951
341 U.S. 491, 95 L. Ed. 1135, 71 S.Ct. 820 ..... 10, 11, 14

Hartman v. *Greenhow*
102 U. S. 672 9

Hospital v. *Wilmington*, (1952)
235 N.C. 597, 70 S.E. 2d 833 12

Indiana ex rel. Anderson v. *Brand*, Ind.1938
303 U.S. 95, 82 L. Ed. 685, 58 S.Ct. 443, 113 A.L.R. 1482, rehearing denied 303 U.S. 667, 82 L. Ed. 1123, 58 S.Ct. 641 ..... 4, 9, 13, 14

Kenney v. *Supreme Lodge*
252 U.S. 411, 40 S.Ct. 371, 64 L. Ed. 638, 10 A.L.R. 716 7

LaCrosse Tel. Corp. v. *Wisconsin Employment Relations Board*, Wisc. 1949, 336 U.S. 18, ... L. Ed. ...., 69 S.Ct. 379 10

Page No.

Madruga v. *Superior Court*, Cal.1954
346 U.S. 556, 98 L. Ed. 290, 74 S.Ct. 298 ..... 10, 14

McKinney v. *Deneen* (1950)
231 N.C. 540, 58 S.E. 2d 107 8

McKnett v. *St. Louis & S. F. R. Co.*
292 U.S. 230, 54 S.Ct. 690, 78 L. Ed. 1277 7

McPherson v. *Blackmer*, Mich.1892.
146 U.S. 1, 36 L. Ed. 969, 13 S.Ct. 3 ..... 9, 13

Michigan Central R. Co. v. *Mix*, Mo.1929
278 U.S. 492, 73 L. Ed. 470, 49 S.Ct. 207 ..... 10, 11, 13

Miller v. *Cornwall R. Co.*, Pa.1897
168 U.S. 131, 42 L.Ed. 409, 18 S.Ct. 34 ..... 3, 4

Missouri v. *Taylor*, Mo.1924
266 U.S. 200, 69 L. Ed. 247, 45 S.Ct. 47 ..... 10, 13

Mt. Vernon-Woodberry Cotton Duck Co. v. *Alabama Interstate Power Co.*, Ala.1916
240 U.S. 30, 60 L. Ed. 507, 36 S.Ct. 234 ..... 10, 13

Mower v. *Fletcher*, Cal.1885
114 U.S. 127, 29 L. Ed. 117, 5 S.Ct. 799 12

Myles Salt Co. v. *Board of Commissioners*, La.1916
239 U.S. 478, 60 L. Ed. 392, 36 S.Ct. 204 ..... 3, 4

Norris v. *Alabama*
294 U.S. 587, 79 L. Ed. 1074, 55 S.Ct. 579 6

Palmer v. *Ashe*, Pa.1951
342 U.S. 134, 96 L. Ed. 154, 72 S.Ct. 191 ..... 9, 10, 14

Parker v. *People of State of Illinois*, Ill.1948
333 U.S. 571, 92 L. Ed. 886, 68 S.Ct. 708 10

Pope v. *Atlantic Coast Line R. Co.*, Ga.1953
345 U.S. 379, 97 L. Ed. 1094, 73 S.Ct. 749 ..... 3, 14

Rescue Army v. *Municipal Court of City of Los Angeles*,
Cal 1947, 331 U.S. 549, 91 L. Ed. 1666, 67 S.Ct. 1409 ..... 10, 14

Sweet v. *Rechel*
159 U.S. 380, 40 L. Ed. 188 5

Titus v. *Wallick*
306 U.S. 282, 59 S.Ct. 557, 83 L. Ed. 653 7

Tregea v. *Modesto Irrigation District*, Cal.1896
164 U.S. 179, 41 L. Ed. 395, 17 S.Ct. 52 ..... 3, 4

Walkinson v. *State of Pennsylvania*, D.C.Pa.1954
119 F.Supp. 722 10

Weston v. *City Council of Charleston*, S.C.1829
2 Pet. 449, 27 U.S. 449, 7 L. Ed. 481 ..... 10, 13

Page No.

White v. *Hart*,
13 Wall. 646, 20 L. Ed. 685 ... 7

Wilkinson v. *Board of Education*, (1930)
199 N.C. 669, 155 S. E. 562 ... 12

Williams v. *North Carolina*, N.C.1945
325 U.S. 226, 89 L. Ed. 1577, 65 S.Ct. 1092, 157 A.L.R. 1366, reahearing denied 325 U.S. 895, 89 L. Ed. 2006, 65 S.Ct. 1560 ... 6

Wilmington & W. R. Co. v. *Alsbrook*, N.C.1892
146 U.S. 279, 36 L. Ed. 972, 13 Sup.Ct.Rep. 72 ... 6, 12

Young v. *Ragen*, Ill.1949
337 U.S. 235, 93 L. Ed. 1333, 69 S.Ct. 1073 ... 6, 9, 10, 14

The Constitution of the United States of America

Article I, § 10, The Contract Clause ... 7

Article IV, § 1, The Full Faith and Credit Clause ... 7

Article IV, § 2, The Privileges or Immunities Clause ... 7

11th Amendment ... 5

14th Amendment ... 1, 5, 8

14th Amendment, § 1 ... 3, 12

Federal Statutes

28 U.S.C. § 1257 ... 10

28 U.S.C. § 1257, Annotation 4 ... 10

28 U.S.C. § 1257 (3) ... 1

The Constitution of the State of North Carolina

Article I, § 17 ... 8

North Carolina General Statutes

§ 1-512 ... 11

§ 136-19 ... 3, 12

Broom, *Constitutional Law* ... 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, *Petitioner*

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, *Respondent*

Petitioner's Brief in Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

Since they are set forth in the Petition for Writ of Certiorari, they are not here repeated.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., § 1257(3) for a Writ of Certiorari to the Supreme Court of North Carolina, on the ground that Federal questions are presented that the acts of the Resondent, in depriving Petitioner of his private property for public use without either just compensation or due process of law, and that the acts of the North Carolina Courts, in refusing to entertain jurisdiction of his civil actions against Respondent, deprive Petitioner of due process of law and equal protection of the laws and deny Petitioner a remedy to enforce his Constitutional rights, all in violation of the 14th Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether any Federal Question is involved.

II. Whether there has been a final judgment of a North Carolina Court of last resort denying Petitioner's Claims of denial of his Constitutional Rights.

LAWS INVOLVED

Since they are the same as set forth in the original Petition and in Respondent's Brief, they are not here repeated.

STATEMENT

Since it would be the same as is in the original Petition and in Respondent's Brief, it is not here repeated, but the following is added.

The appendix to Respondent's Brief is not a part of the record in this case. The first time Petitioner or his attorneys have seen that letter is its appearence as Appendix to Respondent's Brief. It is to be noted that it pertains to a different case *(Cannon v. City of Wilmington and North Carolina State Highway and Public Works Commission)* than the one now before this Court *(Cannon* v. *North Carolina State Highway & Public Works Commission)*. Therefore, it has no place in the instant case.

ARGUMENT

In this Brief we are not repeating the matters set forth and discussed in our original Brief and Petition for Writ of Certiorari; but will merely reply to Respondent's opposition to our Petition.

I. Whether Any Federal Question Is Involved.

A. The entire subject matter of this case consists of the Petitioner's claims that the acts of Respondent, in claiming a part of Petitioner's private property (lands) for public use as a highway right-of-way without paying any compensation whatsoever and without any process of law (any suit, action, proceeding, or otherwise) and without Petitioner's consent, violate Petition-

er's Constitutional rights, as set forth in the United States Constitution, especially § 1 of the 14th Amendment thereto. This involves a Federal question. *Tregea* v. *Modesto Irrigation District*, Cal.1896, 164 U.S. 179, 41 L. Ed. 395, 17 S.Ct. 52; *Backus* v. *Fort Street Union Depot Company*, Mich. 1898, 169 U.S. 557, 42 L. Ed. 853, 18 S.Ct. 445; *Pope* v. *Atlantic Coast Line R. Co.*, Ga.1953, 345 U.S. 379, 97 L. Ed. 1094, 73 S.Ct. 749.

If, under the statute, N.C.G.S. § 136-19, the acts of the Resondent are authorized by its terms and, therefore, legitimate exercise of Respondent's powers and duties, the statute provides for a taking of private property by the State of North Carolina without either due process of law or the payment of just compensation. *Backus* v. *Fort Street Union Depot Co.*, Mich.1898, 169 U.S. 557, 568, 42 L. Ed. 853, 858-859, 18 S.Ct. 445; *Myles Salt Co.* v. *Board of Commissioners*, La.1916, 239 U.S. 478, 484, 60 L. Ed. 392, 396, 36 S.Ct. 204.

If, under the statute, N.C.G.S. § 136-19, (Petition for Certiorari, Appendix A, pages 14-17), the acts of the Respondent are not authorized by its terms, but are read into it by the Respondent by construction, that construction makes the act invalid as appropriation of private property, for public use without either due process of law or the payment of just compensation.

Baltimore & Potomac R. Co. v. *Hopkins*, Dist. Col. 1889, 130 U.S. 210, 224, 32 L. Ed. 908, 913, 9 S.Ct. 503; *Miller* v. *Cornwall R. Co.*, Pa.1897, 168 U.S. 131, 133, 42 L. Ed. 409, 410, 18 S.Ct. 34: "The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial and is denied."

> ". . . the law of the state as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal . . ." *Myles Salt Co.* v. *Board of Commissioners*, supra.

In the instant case Petitioner, in his complaint, alleges that the acts or the Respondent in claiming, without the owner's consent, highway rights-of-way over private property without either deed or condemnation or any attempt to acquire title to such rights-of-way and without any attempt to pay just compensation, offend the provisions of the Federal Constitution. Petitioner contends that, because such acts are not authorized by the statutes and constitute failure on the part of Respondent to perform its duties, Petitioner is entitled to a writ of mandamus to force Respondent to perform its functions and duties properly and in accordance with the Federal Constitution, as well as the statutes. These allegations deny the validity of the statute as it "is made to read by construction." *Miller* v. *Cornwall R. Co.*, supra; *Tregea* v. *Modesto Irrigation District*, supra; *Chicago, B. & Q. R. Co.* v. *Chicago*, Ill.1897, 166 U.S. 226, 41 L. Ed. 979, 17 S.Ct. 581; *Myles Salt Co.* v. *Board of Commissioners*, supra.

Petitioner contends that the statute does not make adequate provision to secure the payment of that just compensation required by the Federal Constitution, in that it allows Respondent to go into possession of private property *prior* to the condemnation proceedings, instead of after they are instituted and while they are pending. *General Oil Co.* v. *Crain*, Tenn.1908, 209 U.S. 211, 228, 52 L. Ed. 754, 764, 28 S.Ct. 475; *Backus* v. *Fort Street Union Depot Co.*, supra; *Indiana ex rel. Anderson* v. *Brand*, Ind.1938, 303 U.S. 95, 82 L. Ed. 685, 58 S.Ct. 443, 113 A.L.R. 1482, rehearing denied 303 U.S. 667, 82 L. Ed. 1123, 58 S.Ct. 641.

Respondent has construed that provision of the statutes to give it the right to go into possession of private property without either the consent of the owner, any process of law, or the payment of just compensation, or securing the payment thereof and to take the property from its owner and vest ownership thereof in Respon-

dent so as to require the owner, if he is to have any, to institute proceedings for just compensation within either six or twelve months after completion of the project and that the owner's "just compensation" be reduced by any special benefits to the property by the construction or improvement of the highway which requires the appropriation of the private property. Petitioner challenges the validity thereof, as being offensive to the protections set forth in the U. S. Constitution. *Backus* v. *Fort Street Union Depot Co.*, supra; *Cherokee Nation* v. *Southern Kansas Railway*, 135 U.S. 641, 34 L. Ed. 295; *Sweet* v. *Rechel*, 159 U.S. 380, 40 L. Ed. 188.

B. Petitioner says that a federal question is presented as to whether his right to equal protection of the laws is denied by the refusal of the North Carolina Courts to entertain jurisdiction of his civil actions for relief from Respondent's claims against Petitioner's lands.

General Oil Co. v. *Crain*, Tenn.1908, 209 U.S. 211, 225-226, 52 L. Ed. 754, 763-764, 28 S.Ct. 475:

> "Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers and the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation."

And, at page 228 in 209 U.S. and page 764 in 52 L. Ed., this Court said, in the same case:

> "It being, then, the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its en-

forcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court. Wilmington & W. R. Co. v. Alsbrook, 146 U.S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72."

Petitioner is not afforded any protection for his constitutional rights. In *Cannon* v. *City*, the North Carolina Supreme Court refused to allow the action to remove from Petitioner's lands the clouds on title created by the acts of Respondent. In the instant case the North Carolina Supreme Court refused to entertain the action. Petitioner knows not where to turn.

> "It is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right. *Young* v. *Ragen*, Ill.1949, 337 U.S. 235, 238, 93 L. Ed. 1333, 1336, 69 S.Ct. 1073, 1074.
>
> "It is also not open to further debate, since the decision in Chicago, Burlington, & Q. Railroad Co. v. Chicago, 166 U.S. 226 (41:979) that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation." *Backus* v. *Fort Street Union Depot Co.*, Mich.1898, 169 U.S. 557, 565, 42 L. Ed. 853, 857, 18 S.Ct. 445.

C. That Petitioner is denied *any* remedy for the protection of his constitutional rights is a federal question. Twice the North Carolina of last resort has refused to entertain actions against Respondent to adjudicate Peitioner's federal rights. *General Oil Co.* v. *Crain*, supra.

> "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. Norris v. Alabama, 294 U.S. 587, 590, 79 L. ed. 1074, 55 S.Ct. 579." *Williams* v. *North Carolina*, N.C.1945, 325 U.S. 226, 236, 89 L. Ed. 1577,

1585, 65 S.Ct. 1092, 157 A.L.R. 1366, rehearing denied 325 U.S. 895, 89 L. Ed. 2006, 65 S.Ct. 1560.

"When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide. Titus v. Wallick, 306 U.S. 282, 291, 59 S.Ct. 557, 83 L. Ed. 653." *Angel* v. *Bullington*, N.C. 1947, 330 U.S. 183, 189, 67 S.Ct. 657, 660, 91 L. Ed. 832.

D. It is a federal question whether Petitioner has been denied due process of law by the acts of the Respondent and the decisions of the North Carolina courts. In the two cases the North Carolina courts have turned deaf ears to Petitioner's assertions of constitutional claims and refused to take jurisdiction of them.

" 'The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution.' McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230, 233, 54 S.Ct. 690, 691, 78 L. Ed. 1277. The Contract Clause, U. S. Const., Art. 1, § 10, the Full Faith and Credit Clause, U.S. Const., art. 4, § 1, the Privileges or Immunities Clause, U. S. Const., art. 4, § 2, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction 'the adjective law of the State', or the exercise of its right to regulate 'the practice and procedure' of its courts. Broderick v. Rosner, 294 U.S. 629, 642, 55 S.Ct. 589, 592, 79 L. Ed. 1100, 100 A.L.R. 1133. A State 'cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent.' Kenney v. Supreme Lodge, 252 U.S. 411, 415, 40 S.Ct. 371, 372, 64 L. Ed. 638, 10 A.L.R. 716; and see White v. Hart, 13 Wall 646, 20 L. Ed. 685. This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, it is not to be defeated under the name of local

practice.' Davis v. Wechler, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143." *Angel* v. *Bullington*, N.C. 1947, 330 U.S. 183, 188, 67 S.Ct. 657, 660, 91. L. Ed. 832.

In *Chicago, B. & Q. R. Co.* v. *Chicago*, Ill.1897, 166 U.S. 226, 41 L. Ed. 979, 17 S.Ct. 581, this Court said:

166 U.S. at pages 234-235, 41 L. Ed. at page 984:

"But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form."

166 U.S. at pages 235-236, 41 L. Ed. at page 984:

"Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty." Mr. Broom in his work on Constitutional Law says, 'is that of enjoying private property without undue interference or molestation.' p. 228. The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen'."

Although the North Carolina Constitution does not contain any provision requiring payment of just compensation, it has been held to be a part of the "law of the land" provision of § 17 of Article I thereof. *McKinney* v. *Deneen*, 231 N.C. 540, 58 S.E. 2d 107(1950). Even so, the North Carolina Courts have closed their doors to Petitioner's claims of rights to just compensation and due process of law.

"But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." *Young* v. *Ragen*, Ill.1949, 337 U. S. 235, 238, 93 L. Ed. 1333, 1336, 69 S.Ct. 1073, 1074.

Thus, Petitioner contends that four—not one—federal questions are involved.

II. Whether There Has Been A Final Judgment Of The North Carolina Court of Last Resort Denying Petitioner's Claims Of Denial Of Constitutional Rights.

A. A proceeding for the issuance of a writ of mandamus was properly "instituted."

Petitioner did all in his power to "institute" the proceeding by filing the papers with the North Carolina Supreme Court for that Court to issue the summons, which application that court of last resort denied by refusing to issue the summons and denying the relief asked.

"But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such Constitution and laws, and its validity sustained. Boyd. v. Thayer, 143 U.S. 135. And it matters not that the judgment reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U.S. 672." *McPherson* v. *Blackmer*, Mich.1892, 146 U.S. 1, 24, 36 L. Ed. 969, 13 S.Ct. 3.

This Court granted writs of certiorari where the state courts denied applications for writs of mandamus (*McPherson* v *Blackmer*, supra; *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission*, Mich.1916, 240 U.S. 564, 60 L. Ed. 802, 36 S.Ct. 424; *Indiana ex. rel. Anderson* v. *Brand*, supra), petitions for writs of habeas corpus (*Young* v. *Ragen*, supra, denied without hearing; *Palmer* v. *Ashe*, Pa.1951, 342 U.S. 134, 96 L. Ed. 154, 72 S.Ct. 191, state supreme court refused to allow appeal), writs of review (*Chicago & E. I. R. Co.* v. *Industrial*

Commission, Ill.1932, 285 U.S. 296, 76 L. Ed. 304, 52 S.Ct. 151; *Atchison T. & S.F. R. Co.* v. *Public Utilities Commission of California*, Cal.1953, 346 U.S. 346, 98 L. Ed. 51, 74 S.Ct. 97), applications for writs of prohibition (*Weston* v. *City Council of Charleston*, S.C.1829, 2 Pet. 449, 27 U.S. 449, 7 L. Ed. 481; *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, Ala. 1916, 240 U.S. 30, 60 L. Ed. 507, 36 S.Ct. 234; *Missouri* v. *Taylor*, Mo.1924, 266 U.S. 200, 69 L. Ed. 247, 45 S.Ct. 47; *Michigan Cent. R. Co.* v. *Mix*, Mo.1929, 278 U.S. 492, 73 L. Ed. 470, 49 S.Ct. 207; *Bandini Petroleum Co.* v. *Superior Court*, Cal.1931, 284 U.S. 8, 76 L. Ed. 136, 52 S.Ct. 103; *Chicago & E. I. R. Co.* v. *Industrial Commission*, supra; *Rescue Army* v. *Municipal Court of City of Los Angeles*, Cal.1947, 331 U.S. 549, 91 L. Ed. 1666; 67 S.Ct. 1409; *Hammerstein* v. *Superior Court*, Cal.1951, 341 U.S. 491, 95 L. Ed. 1135, 71 S.Ct. 820; *Madruga* v. *Superior Court*, Cal.1954, 346 U.S. 556, 98 L. Ed. 290, 74 S.Ct. 298), refused to review contempt proceedings (*Parker* v. *People of State of Illinois*, Ill.1948, 333 U.S. 571, 92 L. Ed. 886, 68 S.Ct. 708), where "judgment" for review was the certification of a labor union as collective bargaining agent (*LaCrosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, Wis.1949, 336 U.S. 18, __ L. Ed. __, 69 S.Ct. 379. *Walkinson* v. *State of Pennsylvania*, D.C.Pa.1954, 119 F.Supp. 722, is listed under annotation number 4 (page 14 in 1955 Cumulative Annual Pocket Part to Title 28 U.S.C.A. §§ 1251-1330) to 28 U.S.C.A., § 1257, as holding that the proper remedy for a party who claimed his constitutional rights were infringed by revocation of his license to operate motor vehicles is petition for writ of certiorari to review the judgment of the state supreme court sustaining such revocation.

We do not find a case exactly on all fours with the instant case. Analogous ones are listed above, especially *Young* v. *Ragen*, supra, and *Palmer* v. *Ashe*, supra, as

to writs of habeas corpus, and *Michigan Cent. R. Co.* v. *Mix*, supra, *Bandini Petroleum Co.* v. *Superior Court*, supra, *Chicago & E. I. R. Co.* v. *Industrial Commission*, supra, *Hammerstein* v. *Superior Court*, supra, and *Madruga* v. *Superior Court*, supra, as to writs of prohibition. However, it seems clear that the North Carolina Supreme Court assumed enough jurisdiction to render the order which we seek to have reviewed.

If the state court refused to accept the filing of th action and to issue the summons and such is not reviewable, then, as this Court said in *General Oil Co.* v. *Crain*, Tenn.1908, 209 U.S. 211, 226, 52 L. Ed. 754, 764, 28 S.Ct. 475, "it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation . . ."

> ". . . a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute." Many cases cited. *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission*, Mich. 1916, 240 U.S. 564, 571, 60 L. Ed. 802, 807, 36 S.Ct. 424.

In its Brief the Respondent failed to give this Court the benefit of the rest of the quotation from *Bear* v. *Commissioners*, (1899) 124 N.C. 204, 207, 32 S.E. 558, 559: ". . . though mandamus is in the nature of an execution, yet it is in the nature of a civil action."

Casualty Co. v. *Commissioners of Saluda*, (1938) 214 N. C. 235, 238, 199 S.E. 7, 9: The statute, General Statutes § 1-512 (formerly C.S. § 867 and Michie's Code 1935, § 867), provides that in mandamus proceedings *to enforce a money demand against counties, cities, towns, or taxing districts* the complaint must show that the demand has been reduced to judgment, in which instances mandamus is the equivalent of execution against

such defendants. The case was one to compel the Board of Commissioners of the City of Saluda to levy tax sufficient to pay judgment on certain tax anticipation notes made by the town.

Respondent's quotations from *Hospital* v. *Wilmington*, (1952) 235 N.C. 597, 601, 70 S.E. 2d 833, 836; and *Wilkinson* v. *Board of Education*, (1930), 199 N.C. 669, 673, 155 S.E. 562, 564, are accurate. In the former case, the North Carolina Supreme Court said: "Mandamus is a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law."

Petitioner contends that the duty of Respondent to "acquire such rights of way and title to such land . . . either by purchase, donation, or condemnation . . ." (N.C.G.S. § 136-19) is such "ministerial duty imposed by law," and that Petitioner has "a clear legal right to demand it," because by the Respondent's failure to perform such "ministerial duty imposed by law," it denies the Petitioner his property without either just compensation or due process of law, in violation of § 1 of the 14th Amendment to the Consitution of the United States.

B. The North Carolina Supreme Court's judgment is final.

> "That judgment is final for the purpose of a writ of error to this court, which terminates litigation between the parties . . ." *Mower* v. *Fletcher*, Cal.1885, 114 U.S. 127, 128, 29 L. Ed. 117, 5 S.Ct. 799.
>
> "It being, then, the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court. Wilmington & W. R. Co. v. Alsbrook, 146 U.S. 279, 36 L. ed. 972,

13 Sup. Ct. Rep. 72 (N.C. 1892)" *General Oil Co. v. Crain*, Tenn.1908, supra pages 5-6.

"Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code . . ." *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, Ala.1916, 240 U.S. 30, 31, 60 L. Ed. 507, 510, 36 S.Ct. 234.

The same ruling applies to proceedings for writ of mandamus. *McPherson* v. *Blackmer*, supra page 9; *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission*, supra page 11; *Indiana ex rel. Anderson* v. *Brand*, supra page 4.

"But, as this court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute. Weston v. Charleston, 2 Pet. 449, 463-465, 7 L. ed. 481, 486, 487; Central Transp. Co. v. Pullman's Car Co., 139 U.S. 24, 49, 35 L. ed. 55, 61, 11 Sup. Ct. Rep. 478; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, ante, 507, 36 Sup. Ct. Rep. 234. This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute. Davies v. Corbin, 112 U.S. 36, 40, 28 L. ed. 627, 629, 5 Sup. Ct. Rep. 4; McPherson v. Blackmer, 146 U.S. 1, 24, 36 L. ed. 869, 873, 13 Sup. Ct. Rep. 3; American Exp. Co. v. Michigan (American Exp. Co. v. Maynard), 177 U.S. 404, 406, 44 L. ed. 823, 824, 20 Sup. Ct. Rep. 695." *Detroit & Mackinac R. Co.* v. *Michigan Railroad Commission*, Mich.1916, 240 U.S. 564, 570-571, 60 L. Ed. 802, 807, 36 S.Ct. 424.

See also, *Missouri* v. *Taylor*, Mo.1924, supra (writ of prohibition); *Michigan Central R. Co.* v. *Mix*, Mo. 1929, supra (writ of prohibition); *Chicago & E. I. R. Co.* v. *Industrial Commission*, Ill.1932, supra (writ of

prohibition); *Indiana ex rel. Anderson* v. *Brand*, Ind. 1938, supra (writ of mandamus); *Rescue Army* v. *Municipal Court*, Cal.1947, supra (writ of prohibition); *Young* v. *Ragen*, Ill.1949, supra (writ of habeas corpus); *Hammerstein* v. *Superior Court*, Cal.1951, supra (writ of prohibition); *Pope* v. *Atlantic Coast Line R. Co.*, Ga. 1953, supra (injunction); *Palmer* v. *Ashe*, Pa.1951, supra (writ of habeas corpus); *Madruga* v. *Superior Court*, Cal.1954, supra (write of prohibition).

Since Petitioner cannot, except by applying to this Court for relief, challenge the 21 March 1956 decree of the North Carolina Supreme Court denying the relief sought, this Court must entertain jurisdiction, or Petitioner has no remedy to protect his asserted Constitutional rights, for the North Carolina courts have twice refused to entertain jurisdiction of Petitioner's claims of denials of his Constitutional rights. Is Petitioner to have no protection?

CONCLUSION

For the foregoing reason Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

W. P. BURKHIMER

H. EDMUND RODGERS

Counsel for Petitioner.

14 September 1956